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May 8, 2000

VIA ~~FEDERAL EXPRESS~~

MAY 09 2000

FCC MAIL ROOM

Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
445 - 12th Street, S.W., TW-A325
Washington, DC 20554

RE: *Ex Parte Notice*
Petition of the Wireless Consumers Alliance, Inc.
File No. WT 99-263

Dear Ms. Salas:

Carl Hilliard, Patrick Daniels and Ronald Hoffman representing the Wireless Consumers Alliance, Inc. met on May 4, 2000 with Mary Woytek, Susan Kimmel, David Furth, Joseph A. Levin, Blaise Scinto and James D. Schlichting, to discuss the posture of the petition for declaratory ruling filed by the Alliance and the matters identified in the attached memorandum. The Alliance representatives expressed the view that the Seventh Circuit's recent ruling in the *Bastien* case does not prohibit the award of damages for any CMRS provider's violation of state consumer protections. Additionally, the Alliance representatives discussed the limitations on civil courts' authority in awarding damages that make it practicably impossible for the award of such damages to constitute an indirect form of rate regulation of CMRS carriers.

Very truly yours,



PATRICK W. DANIELS

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ALLEGATIONS IN THE *BASTIEN* COMPLAINT DIRECTLY CONFLICT WITH THE PROVISIONS OF THE 1934 COMMUNICATIONS ACT PROHIBITING STATES FROM REGULATING THE ENTRY OF CMRS PROVIDERS INTO THE MARKET PLACE

- "Plaintiff brings this action against AT&T Wireless Services, Inc. to secure redress for AT&T Wireless' conduct in signing up wireless telephone subscribers without first **building the cellular towers and other infrastructure necessary to provide reliable cellular service to such subscribers...**" Complaint at ¶ 1.
- "AT&T Wireless is a comparatively recent entrant in the Chicago wireless telephone market. AT&T Wireless signed up subscribers without first **building the cellular towers and other infrastructure necessary to provide reliable cellular connections.**" Complaint at ¶¶ 8-9.
- "The principal common question[is]...[w]hether AT&T Wireless signed up subscribers without first **building the cellular towers and other infrastructure necessary to accommodate good cellular connections** to such subscribers." Complaint at ¶ 19(a).

AT&T WIRELESS HAS EXPLICITLY ARGUED THAT THE ALLEGATIONS IN THE *BASTIEN* COMPLAINT ARE NARROWLY FOCUSED ON AT&T'S ENTRY INTO THE CMRS PROVIDER MARKETPLACE

- "The actual language of the Complaint depended upon Bastien's repeated allegation that AT&T Wireless "sign[ed] up wireless telephone subscribers **without first building the cellular towers and other infrastructure** necessary to provide reliable cellular service to such subscribers..." AT&T Wireless' Opposing Brief in *Bastien* at 1.
- "Bastien cannot avoid the language he elected to plead in the Complaint: that AT&T Wireless allegedly violated the law by providing wireless telephone service 'without first building [more] cellular towers and other infrastructure'...Under the theory [of the Complaint], **to avoid liability, AT&T Wireless would have to stay out of the market until it achieved a level of perfection** that would satisfy [the plaintiff]." AT&T Wireless' Opposing Brief in *Bastien* at 19-20.
- "**The actual language of the Complaint identifies no promise, misrepresentation or omission that AT&T Wireless allegedly made.**" AT&T Wireless' Opposing Brief in *Bastien* at 6.

THE SEVENTH CIRCUIT'S DECISION IN *BASTIEN* IS INAPPLICABLE TO THE ISSUES RAISED IN THE PETITION OF THE WIRELESS CONSUMERS ALLIANCE WHICH SEEKS A RULING THAT REMEDIES UNDER STATE CONSUMER PROTECTIONS FOR FALSE ADVERTISING AND BREACH OF CONTRACT ARE NOT PREEMPTED BY THE COMMUNICATIONS ACT

- The Seventh Circuit correctly noted that the Complaint was replete with allegations of the defendant's inadequate infrastructure which "tread directly on the very areas reserved to the FCC: the modes and conditions under which the [defendants] may begin offering service in the Chicago market," but lacked any reference or allegations concerning the CMRS providers' advertising practices or representations to consumers. *Bastien*, 1999 U.S. Dist. LEXIS 6187 at 7.
- The Seventh Circuit was careful to note that **claims for fraud and deceit do not affect the federal regulation of CMRS providers and that, therefore, Congress could not have intended to preempt such claims.** *Id.*
- The Seventh Circuit concluded that while State fraud claims were not preempted, **such was inapplicable to the Complaint before the Court in which it found a "complete absence of any details in the pleading regarding the particular promises or representations made by [the defendant]."** *Id.*

THE COMMISSION HAS ALREADY DETERMINED THAT ENFORCEMENT OF STATE CONSUMER PROTECTIONS, INCLUDING CONTRACT CLAIMS, ARE NOT PREEMPTED BY THE COMMUNICATIONS ACT. THE ONLY REMAINING ISSUE BEFORE THE COMMISSION IS WHETHER CONSUMERS MAY OBTAIN THE REMEDIES PROVIDED IN STATE CONSUMER PROTECTION AND CONTRACT CLAIMS

THE PETITION OF THE WIRELESS CONSUMERS ALLIANCE DOES NOT CHALLENGE THE QUALITY OR CHARACTERISTICS OF THE INFRASTRUCTURE OF ANY CMRS PROVIDER BUT SEEKS ONLY TO CLARIFY THAT WHEN CMRS PROVIDERS MAKE MISLEADING OR FALSE REPRESENTATIONS TO CONSUMERS ABOUT THE SERVICES OFFERED, CONSUMERS MAY SEEK REMEDIES PROVIDED BY STATE LAW TO PROHIBIT SUCH UNFAIR OR ILLEGAL BUSINESS PRACTICES